-1640

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1640

EMMETT C. WORLEY ..... PETITIONER

vs.

COLUMBIA GAS OF KENTUCKY, INC.
KENTUCKY GAS TRANSMISSION CORP.,
MUTUAL PIPELINE CONTRACTORS, INC.,
JOHN T. DIX, and
CHESTER NOWICKE ..... RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES CONSTITUTION:

AMENDMENT VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." 8, 12

AMENDMENT VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 6

IN THE

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No. ————

EMMETT C. WORLEY ..... PETITIONER

vs.

COLUMBIA GAS OF KENTUCKY, INC.
KENTUCKY GAS TRANSMISSION CORP.,
MUTUAL PIPELINE CONTRACTORS, INC.,
JOHN T. DIX, and
CHESTER NOWICKE ..... RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Emmett C. Worley, respectfully prays a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit, decided and filed December 27, 1973, and an order entered denying petition for hearing en banc on February 1, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is printed in the Appendix, infra, p.p. 1a-16a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 27, 1973. A timely petition for rehearing was denied on February 1, 1974, is printed in the Appendix, infra, p.p. 17a-23a, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254 (1).

STATEMENT OF THE CASE

Petitioner, Emmett C. Worley, was a resident of Springfield, Illinois, and likewise of Odessa, Texas.

He was one of the builders of the unique metal pipelines for long range transmission of natural gas.

This is a continuous metal tube created by perfect welds joining manufactured sections delivered to the job.

The perfection required of Worley has a double basis. Leakage could cause property destruction by burning or human death by explosion. In the second place it could waste and lose our precious, most convenient and least polluting source of energy in the era of energy crisis.

Worley's dedication to the standard of his industry was well known. There were well informed individuals in natural gas transmission who actually considered him the best.

Whatever his rank in the enterprise of making possible cheap transportation of our most precious fuel — he had been rewarded materially.

He owned a base of operations in the state which could claim the largest production of natural gas.

He owned a base of operations in the state which could be the hub or a region of the greatest demand for our most perfect fuel.

His dedication to honor and truth was so well known the insurers who bonded his performance would go a large part of a million dollars on his word alone.

He used his own Aero Commander — a high wing, light twin engine airplane. In fact he was considered to deserve, and to have built up, an estate worth over a million dollars.

Then he met the respondents.

They knew him.

He did not know them.

Respondent, Kentucky Gas Transmission Corporation was a part of The Columbia Gas System, Inc.

The Columbia Gas System, Inc. was, and is, one of the largest, wealthiest and most powerful corporate systems in the world.

On the first day of July, 1971, respondent, Kentucky Gas Transmission Corporation, was merged into Columbia Gas Transmission Corporation, a wholly owned subsidiary of The Columbia Gas System, Inc.

On March 5, 1969, the above corporate respondent, then Kentucky Gas Transmission Corporation, entered a written contract with Mutual Pipeline Contractors, Inc.

Mutual Pipeline Contractors, Inc. is the other corporate respondent, a Kentucky Corporation largely owned and wholly controlled by John T. Dix and Chester Nowicke, the remaining respondents.

The contract called for construction of forty miles of natural gas transmission pipeline in Bracken, in Mason, and in Lewis Counties of Kentucky.

The contract required Kentucky Gas Transmission Corporation to supply 211,423 feet of pipe made by U. S. Steel.

It required Mutual Pipeline Contractors, Inc. to have welders who could meet the very high standards of a test by Columbia Gas System.

The forty miles was to be finished by October 15, 1969.

On September 17, 1969, the whole forty miles of welded pipe was in place ready to be connected and to deliver gas to add to the wealth of Columbia Gas System.

That is strange!

Mutual Pipeline Contractors did not have, and could not get, even one welder who could qualify under Columbia Gas System's test on the project.

The pipe supplied for the job by respondent, Kentucky Gas Transmission Corporation, was not a prod-

uct of U. S. Steel as its contract required. It was a lot from Jones & Laughlin so defective that in places 80 percent of the welds revealed leaks in the area adjoining the welds.

Neither Kentucky Gas Transmission Corporation nor Mutual Pipeline Contractors had the machinery to bend and prepare the pipe for the terrain nor the character and skill to lay forty miles of perfect gas line in a little more than three months.

All the respondents knew the one who had the character and capability for the job.

When that man was asked he told them he had his working capital committed to other matters and would not want to finance such a job.

Respondents took one more step. They knew he was utterly honest. They were taking no risk. They told Emmett C. Worley they would arrange credit with a certain bank so it would meet his payroll checks — and he would not need to finance the payroll.

That induced him. At a cost of possibly forty thousand dollars he brought in a third of a million dollars worth of equipment.

When the forty miles was finished by the honorable master of his trade he had some forty thousand dollars due him for the last semi-monthly period plus extra work and force account work amounting to many more thousands all due.

In addition, Respondents had withheld a retainage of twenty percent from payments earned. That

balance in his favor was more than another ninety thousand dollars.

During his performance for the great profit of respondents, Worley had been unable to see the contract under which he was working. He did not know Mutual could collect from Columbia — once Kentucky — for the great expense he had suffiered because Columbia had furnished Mutual defective pipe not allowed under their written agreement.

What Was Worley Allowed?

He was arrested, jailed and allowed a bond of some $36,000.00 which he could not give and in violation of the Eighth Amendment of our Constitution. (Proof disclosed the highest previous bond in this County's history to be a mere $10,000.00.)

When respondents knew they had their forty miles of perfect pipeline, they stopped the bank from taking care of his payroll checks. They did not tell Worley they had done this. They promised him on his report of the payroll to pay as they had before.

They urged and persuaded the employees to swear out cold check warrants on the pay checks their violation of their obligation to Worley had caused to be unpaid.

While they had Worley in jail under the largest bond ever fixed in that county — one of the oldest in the state — they began to appropriate the rest of his property.

They stole the many welds Worley had to cut out of the defective pipe they supplied.

They never offered to pay him for the added burden the contract between the corporate respondents imposed when defective pipe was supplied by them.

They took Worley's property worth ten times the unpaid checks.

They never paid him the balance they owed him.

They broke him — physically — financially — reputationwise.

One mistake respondents did make. On the trial of this cause they sent back one of the stolen welds.

In fact they made two mistakes. They used an honest man. He admitted under cross examination that the sample showed the pipe was defective.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE SIXTH CIRCUIT NARROWS THE RIGHT TO JURY TRIAL TO THE POINT OF DEPRIVING PETITIONER OF HIS RIGHT UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

One of the fundamental questions presented is whether the United States Court of Appeals for the Sixth Circuit in its Opinion drew the lines of decision too narrowly to permit appellant to enjoy his Constitutional right to jury trial.

The decision of the Court of Appeals for the Sixth Circuit was essentially a ruling that the trial before the Hon. Mac Swinford had presented no issue of fact for submission to a jury.

Judge Swinford had submitted the case and the jury had found compensatory damages of three-quarters of a million dollars and punitive damages of three-quarters of a million dollars.

Of course Judge Swinford enjoys the reputation of being one of our fairest and ablest of trial judges in all the system of United States District Courts. From page 2182 of the record we read the learned trial Judge's charge to the jury:

> "Although the jury may believe from the evidence that the plaintiff was innocent of the offence of uttering worthless check, and that the defendants were the proximate and efficient cause

of procuring the indictment and prosecution of the plaintiff on said charge, *yet if they shall further believe that the defendants, before so procuring the indictment and prosecution of the plaintiff, consulted a disinterested and competent attorney, and fairly and fully laid before said attorney all material facts, and then in good faith acting on the advice of said attorney, procured said indictment and prosecution of the plaintiff, the law is for the defendants and the jury should so find.*" (Emphasis Added)

"In other words, if you have a case in which you think a warrant should issue against someone who you feel has committed an offense and you go to an attorney and you lay out the whole facts before him and he says, "Well, on that I think you are right, I think you should go over there and make out an affidavit for a warrant with the County Judge,"*then, that is a defense, even though it may be that it was a mistake. But you have the burden then of proving that you had stated the whole facts, you had given the whole facts to the attorney; the attorney can't be held for giving you advice if he didn't know the whole facts.*" (Emphasis Added)

Finally the correct rule concerning advice of attorney in Kentucky and throughout the United States is, and was, as stated by the learned trial judge above. It is aptly expressed in *Lynn, et al* v. *Smith, et al*, 281 F 2d 501: (Third Circuit, 1960), at pg. 504:

"Whether or not the defense is established (sic, for malicious prosecution) *is a question of fact to be found by the jury* from all the facts and circumstances taken in connection with such advice. Thus it is for

the jury to determine whether the party has fairly and fully communicated to his counsel the facts within his knowledge, and used reasonable diligence to ascertain the truth, *as also whether he acted in good faith upon the advice received from counsel.*"
(Emphasis supplied.)

II.

IS THERE AN INCOMPLETE RECORD? THE APPEAL TO THE SIXTH CIRCUIT WAS BASED ON THE ENTIRE RECORD. CERTAIN LETTERS FROM COUNSEL AND CERTAIN FEATURES OF THE COURT'S RULING INDICATE THE POSSIBILITY OF OPINION BASED UPON AN INCOMPLETE RECORD.

The opinion of the Sixth Circuit recites that Sligh told employees of Worley "The best thing they could do was to have Worley arrested". The Opinion then proceeds with the finding "that it is only his opinion and does not show that they conspired with him."

A full and accurate record would show that Sligh was an engineer in charge of the Project for Kentucky Gas Transmission Corporation and before the trial that entity was merged with and became Columbia Gas Transmission Corporation.

A correct record should reveal that Leslie McDowell was an engineer immediately under Sligh who told witnesses admiring Worley's twin engine airplane "He's not going to have it long because we are going to attach it along with the other equipment."

The same witnesses, in response to a further question said that Respondent Dix told them shortly thereafter that *everything was beautiful Worley was in jail, they had his equipment and he (Dix) was going to finish the job.*

There should be and would be in a complete record, a number of places where a witness acquainted with the situation had testified similarly concerning the Respondents.

Of course if the record is incomplete, the Court cannot be blamed for finding no evidence of conspiracy.

If such matters are not present in the record now existing, there is a procedure which would rest wholly on the discretion of the Court. Volume 4, Corpus Juris Secundum, 1562 has a discussion under Section 1100 where it is pointed out that an Appellate Court, confronted with an incomplete record, can send the case back to the trial court affirming the trial judgment.

III.

THE DECISION IN THIS CASE IS NOT ONLY IN CONFLICT WITH OTHER UNITED STATES CIRCUIT COURTS OF APPEALS BUT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO BE IN CONFLICT WITH ITS OWN PREVIOUS DECISION NECESSITATING THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

It seems possible to offer the theory that the decision of the Sixth Circuit in this case is not in accord with other rulings of its own.

In *Smoot* v. *Fox*, 353 f. 2d 830, (1965), the decision credited to Chief Judge Weick states:

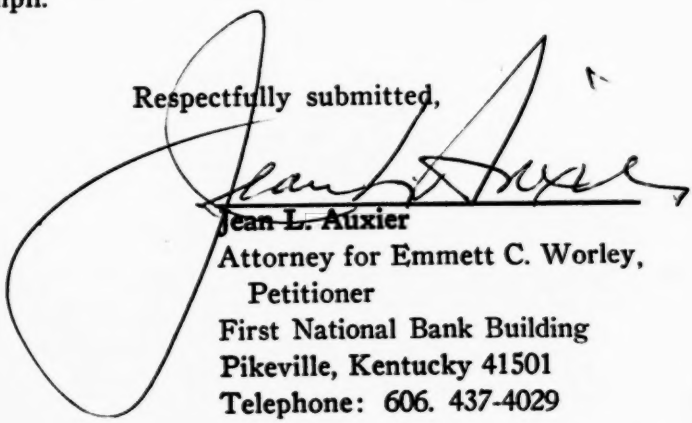
> "The Seventh Amendment to the United States Constitution preserves the right to a jury trial in all suits at common law where the value in controversy exceeds twenty dollars. Rule 38 of the Federal Rules of Civil Procedure also preserves this right. *.An action for malicious prosecution falls well within the recognized forms of action at common law.* 5 Moore's Federal Practice 2d Ed. sec. 38.11 (5) p. 114." (Emphasis supplied.)

It can further be shown that this decision was offered to the Supreme Court and Certiorari denied, 384 U.S. 958.

CONCLUSION

The true gravamen of this action, totally missed by the Sixth Circuit, is not the temporary loss of use of hundreds of thousands of dollars worth of equipment, is not a mere two day wrongful jail incarceration, is not the loss of a private airplane, is not the loss of real property. It is the TOTAL DESTRUCTION of a man, his companies, his spirit, and his very being from a reputable, solid and substantial contractor who had bonding ability of $1,000,000.00 to zero credit, zero business, zero equipment, in fact to zero everything all bottomed upon conspiracy of all Respondents, each acting to complement, aid, benefit, and continue to benefit the other to the TOTAL DESTRUCTION of the Petitioner — precipitated by the wrongful arrest and continuing acts discussed and bragged about before, during and even after fait accompli.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that upon the 30th day of April, 1974 a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was served upon Respondants herein, two copies each by mailing to their attorneys of record, as follows: Honorable Arthur L. Brooks, 309 Security Trust Building, Lexington, Kentucky 40507; Leslie W. Morris II, Stoll, Keenon and Park, 1000 First Security Plaza, Lexington, Kentucky 40507; For Mutual Pipeline Contractors, Inc., and the individual defendants: John T. Dix and Chester Nowicke; Honorable H. Raymond Andrews, and Honorable Thomas E. Morgan, P. O. Box 1273, Charleston, West Virginia 25325; and Honorable Joseph L. Arnold, First National Bank Building, Lexington, Kentucky 40507 as attorneys for Columbia Gas Transmission Company, Kentucky Gas Transmission Corporation, and Columbia Gas of Kentucky, Inc.

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APPENDIX

APPENDIX

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Opinion On Appeal of United States Court of Appeals for the Sixth Circuit (Dated: December 27, 1973) 1a-16a

Order of United States Court of Appeals for the Sixth Circuit Over-ruling Petition for Rehearing (Dated: February 1, 1974)..... 17a-23a

Letter of March 16, 1973 Giving Notice to Clerk of Possibility of Missing Pages From Record 24a-25a

Letter of January 4, 1974 Confirming Pages to be Missing From Record 26a-27a

Nos. 73-1204, - 1205, & - 1207

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1204

EMMETT C. WORLEY, ... *Plaintiff-Appellee,*

v.

COLUMBIA GAS of KENTUCKY, Inc.,
KENTUCKY GAS TRANSMISSION
CORPORATION, ... *Defendants-Appellants.*

No. 73-1205

EMMETT C. WORLEY, ... *Plaintiff-Cross-Appellant,*

v.

COLUMBIA GAS of KENTUCKY,
INC., et al., ... *Defendants-Cross-Appellees.*

No. 73-1207

EMMETT C. WORLEY, ... *Plaintiff-Appellee,*

v.

MUTUAL PIPELINE CONTRACTORS, INC.,
JOHN T. DIX and
CHESTER NOWICKE, ... *Defendants-Appellants.*

**Appeal from United States District Court
for the Eastern District of Kentucky.**

Decided and Filed December 27, 1973.

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

WEICK, Circuit Judge. Mutual Pipeline Contractors, Inc. (hereinafter referred to as Mutual), John T. Dix and Chester Nowicke (Mutual's principal officers), Columbia Gas of Kentucky, Inc. (hereinafter referred to as Columbia Gas), and Kentucky Gas Transmission Corporation (hereinafter referred to as Kentucky Gas Transmission), have appealed from a judgment entered in the District Court against them in favor of the plaintiff Worley, in the amount of $800,000, on a complaint charging the defendants with conspiring to maliciously prosecute plaintiff Worley for the offense of issuing checks drawn on a bank, which checks were not paid because of lack of sufficient funds. In the testimony these checks were referred to as cold checks.

Motions were made by defendants for a directed verdict at the close of plaintiff's evidence, and were renewed at the close of all the evidence, and were denied by the Court. The Court submitted the issues to the jury which returned a verdict against all defendants, in the sum of $750,000 for compensatory, and $750,000 for punitive damages. The Court denied defendants' motions for judgments notwithstanding the verdicts, but granted their motions for new trials unless Worley agreed to a remittitur of $700,000 in the punitive damage award. Worley agreed and judgment was entered on the verdict in the amount of $800,000.

The principal error assigned by the appellants is that the Court should have directed a verdict in their favor. Worley appealed from the order of remittitur, although he had consented to it without protest.

Kentucky Gas Transmission is a Delaware corporation, authorized to do business in Kentucky. Columbia Gas is a Kentucky corporation, and is a public utility, subject to the jurisdiction of the Kentucky Public Service Commission, and is engaged in selling gas at retail in the Commonwealth of Kentucky.

The case arose out of the Kentucky Gas Transmission pipeline construction project in Brachin, Lewis and Mason Counties in Kentucky, in 1969. The prime contractor for construction of the pipeline was Mutual, whose major responsibility was to dig ditches for the pipe. Mutual awarded a subcontract to Worley, doing business as Inland Pipeline Construction Company, to do the work of bending, laying and welding the pipe furnished by Kentucky Gas.

The contract provided that Mutual was to be paid twice a month by Kentucky Gas, based on estimates prepared at the middle and end of each month. Worley was to receive payment from Mutual on a fixed price per foot. Worley's total expected payment for the contract was to be $158,000; he was also to be paid for extra work done beyond the terms of the contract. Worley needed funds to commence operations, and Mutual arranged to and did advance to him about $25,000, in two installments.

Problems immediately arose over welds made by Worley's employees, which welds were rejected by Kentucky Gas inspectors. Worley's position was that these rejects were due to faulty pipe; Kentucky Gas contended that the fault was in improper welding.

Originally, Worley was to be paid by Mutual after the estimate procedure with Kentucky Gas had been completed; however, because of the reject problem, a pattern developed in which Mutual was assisting in meeting Worley's payroll by making advances to Worley, often before payment by Kentucky Gas on the estimates.

On August 14, 1969 Worley opened a bank account with First Security National Bank and Trust Company in Lexington. Prior to this time Worley had been meeting his payroll on an account which he had with an Iowa bank.

Worley contended that Mutual, through Dix, promised him that he could write payroll checks as he saw fit, and that Mutual had made arrangements with First Security National Bank in Lexington, to cover such checks. Dix denied making any such promise. In addition, Gerald Hodges, the bank official responsible for such arrangements, testified that he had no knowledge of any such authorization.

Mutual gave as the reason for their ceasing advances that they thought their prior advances reached the point where they were approaching Worley's total expected payment on the project. Indeed, Mutual claimed it had already paid Worley $60,000 beyond the contract price.

In August and September, 1969, Worley and other Inland officers issued 150 payroll checks totaling $34,000, which checks were dishonored by the bank for insufficient funds. Eleven of these checks were issued

in August, the remainder in September. On September 10, 1969 the bank sent Worley a notice informing him of his balance and listing the returned checks. An additional notice was sent on September 12, 1969.

On September 13, 1969 Oral Curtis, a sawmill operator, personally contacted Worley concerning a lumber bill for $2,600, on which payment was overdue; thereupon Worley paid him with two checks postdated September 27, 1969 and October 11, 1969, because Worley knew he had insufficient funds to cover such checks as of September 13th, the date of actual issuance.

More payroll checks were issued on September 13, 14, 15, 16, 17, and 18. Of the 150 checks written, some were signed by Worley himself, some were signed by his employee, Richard Given, and some were signed by his employee and son-in-law, Douglas Hammock. Most of the checks were for labor; some checks were for material furnished to Worley.

When Dix became aware of Worley's actions, he consulted an attorney, John H. Clarke, Jr., in Maysville, Kentucky, a town near the project site. Clarke advised Dix that under Kentucky law the payees of the cold checks issued by Worley could obtain mechanic's liens against the project, which liens Mutual would eventually have to pay off.

Clarke set up a procedure to pay off the checks in return for releases to prevent subsequent lien claims. Clarke began this payment program on September

18. On the preceding day Roy Clark, Patrick Sappington and Tommy Coker (all employees of Worley) brought their payroll checks to Clarke's office. Clarke told these men that in his opinion an offense had been committed and that they were entitled to obtain warrants. Sappington and Coker were willing to sign complaints, and Clarke took them to the courthouse.

The County Attorney presented the affidavits for warrants, sworn by these two men, to Mason Circuit Judge John A. Breslin, who issued warrants for Worley's arrest based on these two counts. On the same day a local merchant, Clyde Barbour, who had cashed sixteen payroll checks for Worley's employees, sought warrants. Judge Breslin also issued arrest warrants on affidavits signed by Barbour relating to these sixteen checks. There was no evidence that any of the defendants had anything to do with Barbour's pressing of charges against Worley.

Worley had been spending most of his time in Aberdeen, Ohio, but came into Kentucky on September 18th for a meeting of project participants, to discuss results of examination of the pipe. While at this meeting Worley was arrested and lodged in the Mason County jail, on the eighteen arrest warrants obtained by Sappington, Coker and Barbour. Worley claimed that the meeting was a subterfuge to get him into the state and county. Roy Clark, one of Worley's employees, testified that he had told Worley about the outstanding warrants on the very day they were issued, September 17th.

Worley was in jail from 3:00 p.m. on September 18, 1969 until 10:00 a.m. on September 20, 1969 when a preliminary hearing was held. Worley was bound over to the county grand jury on all eighteen warrants considered by the Judge on September 17th.

On September 22, 1969 the grand jury was in session. On this same day two other employees of Worley, James C. Lykins and Howard Moore, Jr., came to Clarke's office to obtain payment of cold checks issued to them on September 6, which they had been unable to cash at the bank. Following discussions with Clarke, Moore and Lykins went before the grand jury. Moore testified that he understood he would get his check cashed by Clarke regardless of whether or not he appeared before the grand jury.

The grand jury returned two indictments on the checks of Moore and Lykins. Worley was arraigned on these charges on September 22, 1969, but was released on his own recognizance, and spent no time in in jail under these indictments.

On September 25, 1969 J. C. Penney Co. obtained two warrants for Worley's arrest for issuing cold checks.

Trial on Moore's and Lykin's charges was set for September 11, 1970. The indictment as to Moore was dimissed because the prosecuting attorney could not obtain Moore's presence. The indictment on the Lykins matter was tried to a jury and the defendant, Worley, was found not guilty.

No disposition has been made concerning the warrants which were obtained by Sappington, Coker and Barbour. These matters are still pending before the grand jury.

There are pending civil actions in other courts arising out of disputes between the parties. Thus, the final economic resolution of the contract controversy does not rest with this decision.

It is noteworthy that although Worley sued three corporations and the officers of one of them (Mutual) for conspiracy to maliciously prosecute him for issuing cold checks, he did not sue any of the holders of these cold checks who signed the affidavits for warrants under which he was arrested and jailed, or who were responsible for his indictment.

We find there is not even a scintilla of evidence in the record that Columbia Gas ever conspired with the other defendants to maliciously prosecute Worley. It had no contractual relationship with Worley or with Mutual. Jimmy E. Sligh, who Worley claimed was an agent of Columbia Gas, was not employed by Columbia Gas but was an inspector for Kentucky Gas Transmission. There is no proof that Columbia Gas had anything to do with either Worley's arrest or his prosecution. The District Court erred in denying its motion for a directed verdict.

Kentucky Gas Transmission's contractual relationship was with Mutual. Worley was Mutual's subcontractor.

Worley sought to tie Kentucky Gas Transmission into the alleged conspiracy by proof of the activity of its Chief Inspector on the pipeline project, Jimmy E. Sligh. Sligh was in charge of all inspectors on the pipeline project, and it was his duty to see that specifications and codes were adhered to and that all phases of the job were properly and correctly performed. He was not a welding inspector.

There was no proof that Sligh had actual or apparent authority from his employer, Kentucky Gas Transmission, to prosecute Worley for the cold checks which Worley issued to his own employees and materialmen.

The evidence on which Worley relied to prove Sligh's alleged participation in the conspiracy was that Sligh sat in the courtroom at the Lykins trial; the disputed evidence that Sligh attended a meeting in Attorney Clarke's office when Sappington and Coker signed affidavits for warrants for the arrest of Worley; and Sligh's conversations with Worley's employees, Roy Clark, Paul J. Schulien, Eugene Harness and Charles Kaufman.

There was no evidence that any affidavits for the arrest of Worley, or the indictment, were induced by or resulted from any of these conversations or incidents.

In our opinion, the District Court erred in denying the motion for a directed verdict filed by Kentucky Gas Transmission, for the reason that its inspector Sligh had no actual or apparent authority from his employer either to conspire to or to cause the arrest of

Worley, and in fact, did not cause his arrest or indictment.

This disposition of the case determines the issue of conspiracy, because Mutual could not conspire with itself or with its own officers to prosecute Worley. Mutual could be liable only for acts of its officers on the theory of respondeat superior. The corporation can act only through its officers and agents. We will consider only whether there is substantial evidence to prove that Mutual, Dix and Nowicke are liable for malicious prosecution of Worley.

The remaining defendants assign numerous errors. Their basic contentions are that Worley failed to establish the elements of even a prima facie case of malicious prosecution. First, the defendants contend that Worley failed to show that they were the proximate and efficient cause of the prosecution. Second, they contend that Worley has failed to show that the prosecution, which allegedly caused his damages, had been terminated in his favor. Third, even assuming the first two arguments as rejected, it is asserted that Worley failed to show a lack of probable cause for his prosecution. Fourth, the defendants contend that advice of counsel is an absolute bar to a malicious prosecution action. Fifth, the defendants contend that the verdict was grossly excessive; that it resulted from passion and prejudice and the misconduct of plaintiff's counsel; and that it was tainted by the admission of incompetent evidence concerning the disputes between the parties, which disputes are the subject of various civil actions.

We consider first the question of whether there had been a termination of the prosecution which caused the alleged damages. Such a termination is required by Kentucky law. *Freeman* v. *Logan*, 475 S.W. 2d 636 (Ky. 1972); *Van Arsdale* v. *Caswell*, 311 S.W.2d 404 (Ky. 1958); and *Conder* v. *Morrison*, 275 Ky. 360, 121 SW.2d 930 (1938).

The eighteen warrants issued by Judge Breslin on September 17, 1969 were still pending when this action was brought. The only charge that had terminated was the grand jury indictment based on Moore's and Lykins' testimony, returned on September 22, 1969, two days after Worley was released from jail upon his execution of a personal bond in the amount of $5,000. Worley did not spend time in jail on the Moore-Lykins indictment. He was not even arrested on the indictment. Worley's complaint alleges damages resulting from his imprisonment on September 18th to 20th, but this imprisonment was based on eighteen warrants that have not even begun to be processed through the legal system, let alone terminated.[1]

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[1] Worley called Circuit Judge John A. Breslin, who presided at his trial, to prove his acquittal on the Lykins indictment. Judge Breslin was asked about a number of other matters, concerning which his recollection was vague. He did testify that a number of civil suits had been filed; that the matter "pretty soon became what I describe as a can of worms"; and that he would have to go by his records completely as he had no recollection of individual events. In response to a question by plaintiff's counsel as to

(Continued on page 12a)

With respect to the terminated prosecution, Worley's alleged damages flowing from such action are his expenses of litigation. He was not arrested nor confined. It would hardly support a verdict and judgment of $1,500,000. Worley did not even claim any real business losses flowing from the Moore-Lykins indictment.

Even assuming that Worley could show that the defendants were the proximate cause of his prosecution, he would not be entitled to recover if there was probable cause to warrant the prosecution. *Freeman* v. *Logan*, 475 S.W. 2d 636 (Ky. 1972); *Schott* v. *Indiana Nat'l Life Ins. Co.*, 160 Ky. 533, 169 S.W. 1023 (1914); *McClarty* v. *Bickel*, 155 Ky. 254, 159 S.W. 783 (1913). Worley had the burden of making a clear showing that there was no probable cause. *Reid* v. *True*, 302 S.W.2d 846 (Ky. 1957) and *Lexington Cab Co.* v. *Terrell*, 282 Ky. 70, 137 S.W. 2d (1940).

There was a dispute in the testimony of Worley and Dix as to whether Mutual had ever agreed to advance funds to cover Worley's payroll checks. The bank in

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(Continued from page 11a)

whether there were any charges pending in his court against Worley, he answered, "Not to my knowledge." This does not prove that the charges were terminated. They could be terminated only by a "no bill" or a dismissal by the court. The Circuit Court in Kentucky is a court of record, and its entries can be proven only by its records. *Simpson* v. *Anthrobus*, 260 Ky. 641, 86 S.W.2d 544 (1935); *cf. Poynter* v. *Smith*, 290 Ky. 169, 160 S.W.2d 380 (1942). The burden of proof to show termination was on plaintiff, and he did not meet that burden.

Lexington, on which the cold checks were drawn, was never informed by Worley of any such arrangement. It was Worley's burden to show clearly that Dix had agreed to advance funds to cover the payroll checks, and that Dix never changed his position, because only then could Worley show lack of probable cause. The mere conflict in testimony makes Worley's task almost impossible.

There are two Kentucky cases dealing with the issue of probable cause in cold check cases: *Haseldon* v. *York*, 271 Ky. 567, 112 S.W.2d 984 (1938), and *Davis* v. *Brady*, 218 Ky. 384, 291 S.W. 412 (1927) In *Haseldon, supra*, plaintiff York's check was refused payment for want of funds when Haseldon tried to negotiate it. Payment was refused a second time and thereafter York withdrew from the bank what funds he did have there. The Court found that probable cause existed on this set of facts and held that Haseldon's motion for a preemptory instruction should have been granted. In the present case, the checks that Moore and Lykins were attempting to cash had been refused payment. The checks in question were dated September 6, 1969 and it was September 22, 1969 before the two men went to the grand jury. Their inability to negotiate the checks at the bank clearly resulted in probale cause to think that an offense had been committed.

In *Davis, supra*, the plaintiff issued a check to the defendant's son (who was also defendant's agent) for rental payment. The son's usual practice was to make deposits at the end of each week. When the son deposited the check at the end of the week it was returned n.s.f. The son went before a Justice of the Peace and obtained a

warrant. The plaintiff's attorney claimed that his client had sufficient money on deposit in the bank on the day she issued the check, but she drew other checks in the interim. The Court concluded that the only reasonable conclusion any attorney could reach was that a violation of the statute had taken place. The Court found that probable cause clearly existed for the issuance of a warrant. If the issuance of one check in this manner, knowing sufficient funds might not be on hand if presentment were delayed only shortly, is sufficient to establish probable cause, Worley's actions in writing checks which he had some reason to suspect might not be covered by Mutual, sufficed to show probable cause that a violation of the cold check statute had taken place.

Moreover, Lykins' case, which was the only one resulting in an acquittal, had come from an indictment by the county grand jury. In *Jones* v. *Louisville & N. R. Co.*, 29 Ky. Law Rep. 945, 96 S.W. 793 (1906), the Court of Appeals stated:

> The true doctrine is that the finding by the grand jury is prima facie evidence of probable cause. Ulman v. Abrams, 9 Bush. 738; Burks v. Ferrell, 80 S.W. 809, 26 Ky. Law Rep. 36; Lancaster v. Langston, 36 S.W. 521, 18 Ky. Law Rep. 299. (96 S.W. at 794).

The affidavits for the warrants were approved by the attorney who prepared them, by the County Attorney, and by the Circuit Judge who issued the warrants. The grand jury found sufficient evidence to return an indictment on two counts. At the trial the Circuit Judge submitted the issues to a jury for its determination.

The fact that Worley was acquitted on the Lykins charge does not show a lack of probable cause. *Conder* v. *Morrison*, 275 Ky. 360, 121 S.W.2d 930 (1938); *Haseldon* v. *York*, 271 Ky. 567, 112 S.W.2d 984 (1938); *Sills* v. *Paducah Box & Basket Co.*, 251 Ky. 783, 66 S.W.2d 24 (1933); *Stephens* v. *Gravit*, 136 Ky. 479, 124 S.W. 414 (1910).

Even if Worley had been able to establish a prima facie case, the defendants would have had an affirmative defense in that all recommendations for obtaining warrants came from an attorney. Under Kentucky law such advice of counsel is a complete defense to an action for malicious prosecution. *Taylor* v. *Shepherd*, 391 F.2d 263 (6th Cir. 1968); *Puckett* v. *Clark*, 410 S.W.2d 154 (Ky. 1966); *Mays* v. *Watt*, 387 S.W. 2d 872 (1964); *Bell* v. *Jewel Tea Co.*, 135 F.Supp. 745 (W.D. Ky. 1955); *Cravens* v. *Long*, 257 S.W.2d 548 (Ky. 1953); *Lexington Cab Co.* v. *Terrell*, 282 Ky. 70, 137 S.W.2d 721 (1940); *Davis* v. *Brady*, 218 Ky. 384, 291 S.W. 412 (1927); *National Life & Acc. Ins. Co.* v. *Gibson*, 31 Ky. Law Rep. 101, 101 S.W. 895 (1907); *Tandy* v. *Riley*, 26 Ky. Law Rep. 98, 80 S.W. 776 (1904); *Farmers' & Shippers' Tobacco Whse. Co.* v. *Gibbons*, 107 Ky. 611, 55 S.W.2 (1900); *Mesker* v. *McCourt*, 19 Ky. Law Rep. 1897, 44 S.W. 975 (1898); *Lancaster* v. *Langston*, 18 Ky. Law Rep. 299, 36 S.W. 521 (1896).

In this case Attorney Clarke informed Moore, Lykins, Sappington and Coker that there was probable cause to obtain warrants. There is no indication in the record

that Attorney Clarke was operating with insufficient facts on which to base his judgment.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint. The cross-appeal of Emmett C. Worley is hereby dismissed at his cost.

FILED: Feb. 1, 1974
James A. Higgins, Clerk

Nos. 73-1204, - 1205, & - 1207

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1204

EMMETT C. WORLEY ..... *Plaintiff-Appellee*

vs

COLUMBIA GAS OF KENTUCKY, INC., KENTUCKY GAS TRANSMISSION CORPORATION ..... *Defendants-Appellants*

No. 73-1205

EMMETT C. WORLEY, ... *Plaintiff-Cross-Appellant*

vs

COLUMBIA GAS OF KENTUCKY, INC., et al, ... *Defendants-Cross-Appellees*

No. 73-1207

EMMETT C. WORLEY, ... *Plaintiff-Appellee*

vs

MUTUAL PIPELINE CONTRACTORS, INC., JOHN T. DIX and CHESTER NOWICKE, ... *Defendants-Appellants*

ORDER

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

I

These appeals came on to be heard on a petition for a rehearing with a suggestion that they be heard en banc. No Judge having requested that a vote be taken thereon, the petition was heard and determined by the panel.

In our opinion in this case we found as to Columbia Gas that there was not even a scintilla of evidence that it had conspired with anyone to maliciously prosecute Worley. In his petition for rehearing plaintiff-appellee raises no argument challenging this finding.

As to Kentucky Gas Transmission Corporation, we found that its only possible participation in the alleged conspiracy would have been through the acts of Jimmy E. Sligh, its Chief Inspector on the project; and we further found his acts clearly insufficient to establish such conspiracy. Plaintiff contends that Sligh admitted to threatening the arrest of Worley. Plaintiff relies on Sligh's response to two of Worley's employees, Roy Clark and Ronald Harness, who had followed him to his automobile and who asked him how they might get their pay checks cashed. Worley's employees testified that Sligh said that the best thing they could do was to have Worley arrested. That states only his opinion, and does not show that he conspired with them. Nor does Sligh's conversation with Paul J. Schulien and his employee, Charles Kaufman,

who was a supplier of materials to Worley, indicate any conspiracy with them. As we pointed out in our opinion, there was no evidence that Worley's arrest on the eighteen warrants or the indictment resulted from any of these conversations.

As to Mutual Pipeline Contractors, Inc., we reversed, holding that even if the activities of Mutual or of its officers (John Dix and Chester Nowicke) were the proximate cause of the prosecution, (1) there was probable cause for the prosecution, and (2) the advice of counsel served as an absolute defense.

Relevant to the probable cause issue, plaintiff's counsel says that the testimony of Bob Bates, a bank official, showed that Dix had told First Security Bank to cover checks written by Worley. What Bates testified to was that Dix asked him "to take care of" Worley's banking needs. Bates admittedly took that to be a request not to let any of Worley's checks bounce.

Gerald Hodges, another bank official, testified that there had been absolutely no commitment by Dix to cover Worley's checks, and that he [Hodges] was the responsible officer in charge of such arrangements. Besides the fact that Bates' interpretation of the given words seems bizarre, the mere conflict between Bates and Hodges militates against Worley because he must make a clear showing that there was no probable cause. *Reid* v. *True*, 302 S.W.2d 846 (Ky. 1957), and *Lexington Cab Co.* v. *Terrell*, 282 Ky. 70, 137 S.W.2d 721 (1940).

Worley knew that the bank was not covering his

cold checks. With knowledge that he did not have sufficient funds in the bank, he wrote a total of 150 n.s.f. checks, totaling $34,000, over a period of two months.

Also supporting probable cause to obtain the warrants was the fact that J. C. Penney Co. and Clyde Barbour, a local merchant, also obtained warrants against Worley, for writing cold checks. Worley did not allege that either the Penney Co. or Barbour were part of the "corporate octopus" that Worley believed was "out to get him". If they thought they had probable cause, it is a storng indication that the other persons who obtained warrants also thought so.

On the advice of counsel issue, plaintiff suggests that Attorney Clarke was prejudiced merely because he signed the bond as attorney in fact for defendant's insurance carrier. We do not see how this could make Clarke prejudiced because he was not subject to personal liability. Moreover, Kentucky law requires only that an attorney be in possession of all the facts, not that he be disinterested, for the defense of advice of counsel to be valid in a malicious prosecution case.

The probable cause and advice of counsel bases also support the judgment as to the Kentucky Gas Transmission Corporation and Columbia Gas of Kentucky, even though we found for those defendants on the ground of insufficient evidence to show conspiracy to maliciously prosecute.

In our previous opinion we discussed the issue of termination of a supposed malicious prosecution. We

found that there was no evidence that the counts on which Worley had been imprisoned had been successfully terminated in his favor. We clearly noted that the Moore and Lykins indictment had been terminated successfully in Worley's favor, but that in our opinion it hardly justified an award of $1,500,000. Thus, we did not decide against Worley on the termination issue since the Court submitted to the jury only the issues with respect to the Moore indictment.

Attached to the petition for rehearing plaintiff's attorney has filed a copy of an order of Judge Breslin, stating that the Sappington, Coker, Penney Co. and Barbour warrants, on which Worley had been imprisoned, had been abandoned. A copy of that order was not made a part of the record in this case.

In their briefs the appellants had raised the issue of lack of the necessary court order terminating the warrants, and appellee's counsel did not offer any such order in evidence, if indeed he knew that it existed. Had our prior decision been based solely on the termination issue, we would be faced with a difficult question as to the effect of Judge Breslin's order, and whether plaintiff was estopped from introducing it into the record at this late date; however, since there are other grounds to support our decision, we need not consider the effect of the state court order.

The petition for rehearing is denied.

II

Plaintiff has moved to amend his complaint to state a violation of the federal civil rights statutes against defendants in addition to his original charge of conspiracy to maliciously prosecute.

We refuse to allow such amendment because it is a well-established principle of law that an appellate court will not allow amendments to conform to evidence, by a losing party, to bring about a reversal of a judgment which is otherwise correct. *United States* v. *Shapiro, Inc.*, 202 F.2d 459 (D.C. Cir. 1953); *Trantham* v. *Canal Ins. Co.*, 117 F.Supp. 241 (E.D. Tenn. 1953), *aff'd*, 220 F.2d 752 (6th Cir. 1955).

Our denial of plaintiff's petition for rehearing has previously expressed our belief in the correctness of the judgment in this case. To allow amendment would be a futile gesture because any civil rights violation would necesarily have to rise or fall on the establishing of the requisite elements of malicious prosecution. The supposed new theory is actually dependent on the old.

The issues of probable cause, advice of counsel, and lack of proof of conspiratorial activity, have been decided adversely to plaintiff, and plaintiff is now barred from invoking them in a civil rights action by the doctrines of res judicata and collateral estoppel.

Furthermore, "a complaint cannot be amended on appeal . . . where the amendment raises issues not within the theory on which the case was tried." 3 Moore's Fed. Prac., IP. 15.11 (2d ed. 1964).

We think a fair reading of the record shows that the case was not tried on the issues raised at this late date.

Plaintiff's motion to amend is denied.

ENTERED BY ORDER OF THE COURT.

/s/ James A. Higgins
Clerk

Telephone 606:253-1515

Law Offices Of
DAVID C. GRAVES, JR.

Suite 100, 256 South Limestone Street
Lexington, Kentucky 40508

March

Sixteen

1973

Mr. James A. Higgins, Clerk
United States Court of Appeals
for the Sixth Circuit
601 Post Office Building
Cincinnati, Ohio 45202

RE: Possibility of Missing Pages From Transcript of United States Court of Appeals for the Sixth Circuit, Nos. 73-1204, 73-1205 & 73-1207

Dear Mr. Higgins:

Again, thank you for your consideration, cooperation and courtesy shown us last Thursday, the 8th day of March, 1973, as regards photocopying the above record.

In correlating our pages, we have either missed, and/or the following pages were not present:

1027, 1307, 1388, 1458, 1547 & 1548.

Insofar as my work on the appeal is concerned, I

will attempt to get to your office and ascertain the importance of those pages.

In accordance with our conversation, I am delighted to attach this letter to a package containing some books which you and your wife may be interested in reading.

Yours very truly,

/s/ Dave Graves

DCGJr/drb

Telephone 606:253-151

Law Offices Of
DAVID C. GRAVES, JR.

Suite 100, 256 South Limestone Street
Lexington, Kentucky 40508

January

Four

1974

Mr. James A. Higgins, Clerk
United States Court of
Appeals for the Sixth Circuit
601 Post Office Building
Cincinnati, Ohio 45202

RE: 1) FILING OF MOTION TO AMEND AND SUPPLEMENT THE COMPLAINT TO CONFORM TO ALL THE EVIDENCE.

2) Second Notice, as to missing pages from the official record and transcript: WORLEY v. COLUMBIA GAS ET AL, 73-1204, 1205, 1207.

Dear Mr. Higgins:

Enclosed, pursuant to the Federal Rules of Civil Procedure, is the original and three copies of the above noted motion and pleading. Please see that the same are properly filed.

Again, as was forwarded to you under the date of March 16, 1973, notice is given that there is missing from the original transcript and record of the above-styled case, the following pages: 1027, 1307, 1388, 1547, and 1548 (originally, upon return from photocopying the record we had also thought that page 1458 was missing; however, another attorney in further checking the record found the same to be present.

Since it is apparent to anyone that has cursorily studied the record — let alone someone who has lived through the situation — the factual portion of the opinion is totally in error and the missing pages may be extremely important.

Not only on behalf of my client, but also myself, I wish to express appreciation of your ever-extended courtesy to the members of the Bar and their clients appearing before your forum.

Very truly yours,

/s/ D. C. Graves, Jr.
David C. Graves, Jr.

DCGJr/mbg

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1640

EMMETT C. WORLEY, ... Petitioner,

v.

COLUMBIA GAS OF KENTUCKY, INC.,
KENTUCKY GAS TRANSMISSION CORP.,
MUTUAL PIPELINE CONTRACTORS, INC.,
JOHN T. DIX and
CHESTER NOWICKE. ..... Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF MUTUAL PIPELINE CONTRACTORS, INC., JOHN T. DIX AND CHESTER NOWICKE, THREE OF THE RESPONDENTS

MAY IT PLEASE THE COURT:

The Respondents, Mutual Pipeline Contractors, Inc., John T. Dix and Chester Nowicke, respectfully pray that this Court deny Petitioner's Petition for a Writ of Certiorari.

OPINION BELOW

The opinion delivered by the Court of Appeals, Sixth Circuit, including the Court's opinion and order denying the Petition for Rehearing, and its order denying plaintiff's motion to amend complaint, is reported at 491 F.2d 256; and appears at pages 1a through 23a of the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1973. Rehearing was denied on February 1, 1974. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1). Petitioner's Petition for Writ of Certiorari was docketed by the Clerk of this Court on May 1, 1974.

THE QUESTIONS PRESENTED

The Petitioner does not set forth the questions presented for review but we assume, from the headings under his "Reasons For Granting the Writ" or Argument, that he intends to present the following questions:

I. Whether the Petitioner was deprived of his Seventh Amendment right to a jury trial when the jury's verdict was reversed by the Court of Appeals?

II. Whether the opinion of the Court of Appeals was based upon an incomplete record?

III. Whether the opinion of the Court of Appeals departed from the accepted and usual course of judicial

proceedings or was in conflict with its own previous decisions?

These Respondents maintain that these questions should clearly be answered in the negative and that they present no important questions of federal law.

CONSTITUTIONAL PROVISIONS

This case involves no constitutional provisions, treaties, statutes, ordinances or regulations. It is these Respondents' contention that none of the considerations governing review on certiorari, such as set forth in U.S. Sup. Ct. Rule 19(1)(b) or otherwise, are present in this case. The Petitioner's Petition, however, asserts (at pages 8-10) that he was deprived of his right to jury trial as guaranteed under the Seventh Amendment to the Constitution of the United States. The Seventh Amendment provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Petitioner, in his Table of Authorities (at page iii) also quotes the Eighth Amendment but no specific or relevant argument is presented thereafter.

STATEMENT OF THE CASE

Petitioner instituted his civil action against all Respondents in the United States District Court for the Eastern District of Kentucky. The jurisdiction of the District Court was based upon diversity of citizenship.

The question presented to the District Court and on appeal to the Court of Appeals, Sixth Circuit, was whether the evidence was sufficient to support a finding of a conspiracy on the part of the Respondents to maliciously prosecute the Petitioner.

These Respondents, at trial and on appeal, raised the four contentions enumerated by Circuit Judge Weick in the Court's opinion (491 F.2d at 261 and at page 10(a) of the Appendix to the Petition):

> "First, the defendants contend that Worley failed to show that they were the proximate and efficient cause of the prosecution. Second, they contend that Worley has failed to show that the prosecution, which allegedly caused his damages, had been terminated in his favor. Third, even assuming the first two arguments as rejected, it is asserted that Worley failed to show a lack of probable cause for his prosecution. Fourth, the defendants contend that advice of counsel is an absolute bar to a malicious prosecution action."

The Court's opinion accurately and completely recited all of the facts material to a consideration of these questions. The marshaling of these facts led the Court to the inevitable conclusion that the Peti-

tioner had failed to prove any of the elements requisite to a cause of action for malicious prosecution. The Court did not have to reach the fifth question, namely, whether the verdict was excessive and a result of passion and prejudice, misconduct of counsel and the admission of incompetent evidence. The judgment of the District Court was reversed and remanded with instructions to dismiss the Complaint.

These Respondents hereby adopt Judge Weick's statement of the case which appears at 491 F.2d at 258-263 and at pages 3a-16a of the Appendix to the Petition.

ARGUMENT

I

COURTS DO NOT DEPRIVE ONE OF HIS RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN A MOTION FOR A DIRECTED VERDICT AND A MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ARE OVERRULED AND SUCH RULING IS REVERSED ON APPEAL; FURTHERMORE, THE SIXTH CIRCUIT PROPERLY RULED ON THE FACTS

Petitioner argues that he was deprived of his Seventh Amendment right to a jury trial when the jury's verdict was reversed. In effect, this argument must mean either that a circuit court cannot reverse a district court's refusal to grant a directed verdict or a judgment notwithstanding the verdict or that the

Sixth Circuit applied the wrong standard in so doing. If Petitioner relies on the lack of power argument he must be asking the Supreme Court to overrule Rule 50 of the Federal Rules of Civil Procedure and well-established cases such as *Galloway* v. *United States,* 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943), where the Supreme Court, speaking through Mr. Justice Rutledge, ruled:

> "If the intention is to claim generally that the amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U.S. 450. The objection therefore comes too late."

319 U.S. at 389, 63 S. Ct. at 1086, 87 L. Ed. at 1470. Furthermore, the Supreme Court has held in *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967), that a circuit court may properly reverse a district court's denial of a motion for a judgment notwithstanding the verdict and direct a verdict for the defendant. The Court, speaking through Mr. Justice White, stated:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* * * * Likewise, the statutory

> grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal."

386 U.S. at 322, 87 S.Ct. at 1076, 18 L.Ed. 2d at ——

Therefore, it would seem the Petitioner is limited to the argument that the Sixth Circuit applied the wrong standard. Petitioner, in fact, asserts the proper standard is set forth in *Lynn* v. *Smith,* 281 F.2d 501 (3rd Cir., 1960) and he quotes from that opinion:

> "Thus it is for the jury to determine whether the party has fairly and fully communicated to his counsel the facts within his knowledge, and used reasonable diligence to ascertain the truth, as also whether he acted in good faith upon the advice received from counsel."

Id. at 505. However, this is misleading in two regards. First, the Third Circuit recognizes that these are not issues for the jury *except* when the good faith and full disclosure are *disputed*. *Id.* at 505. The most important distinction, though, is that the Third Circuit was applying Pennsylvania law, as that court explains throughout its opinion. In *Lynn* v. *Smith,* supra, as well as in the present case, jurisdiction is based on diversity of citizenship and so the law of the forum state is controlling. *Id.* at 504. Therefore, in a case tried in the District Court for the Eastern District of Kentucky the law of Kentucky applies and it has been most aptly expressed by the Kentucky Court of Appeals. In *Puckett* v. *Clark,* 410 S.W.2d 154 (Ky., 1966), the highest court in Kentucky affirmed the trial court which had ruled there was no probable

cause based on the advice of counsel and rendered a judgment *n.o.v.* in favor of the defendants. The Kentucky court explained:

> "* * * since public policy favors the exposure of crime, and malicious prosecution actions are not favored in the law, a plaintiff has the burden of making a *clear showing* of no probable cause."

Id. at 157. The Sixth Circuit clearly recognized the Kentucky standard when it cited *Puckett* v. *Clark*, supra, and other Kentucky cases (491 F.2d at 263 and at page 15a of the Appendix to the Petition).

Since the Third Circuit was applying Pennsylvania law in *Lynn* v. *Smith*, supra, at 504, and the Sixth Circuit was applying Kentucky law, and because the result under either ruling depends on the peculiar facts of the case, it follows that the decision in the instant case is not in conflict with any decision of another court of appeals. In this respect the Sixth Circuit has carefully followed Kentucky law. Further, it does not appear that the Sixth Circuit has decided a question of law not previously decided by the Supreme Court or has in any way departed from the usual course of judicial proceedings. It would, therefore, appear the Petitioner has stated no reason for the Supreme Court to grant certiorari.

II

THE RECORD IN THIS CASE WAS COMPLETE AND THERE IS NO BASIS FOR PETITIONER'S ASSERTION THAT THE COURT'S RULING MAY HAVE BEEN INDUCED BY AN INCOMPLETE RECORD

The Petitioner makes the unaccountable and untimely contention that the record on appeal was incomplete; and he implies that the alleged "missing pages" may have contained key testimony establishing an alleged conspiracy between the Respondents.

Any rational and fair-minded reading of the pertinent portions of the Transcript (which has not been filed with this Court) reveals an unbroken continuity. There are no omitted pages but only, in several instances, a harmless misnumbering.

Any further discussion of this point would tend to be wasteful of this Court's time.

III

CLEARLY THERE IS A RIGHT TO A JURY TRIAL IN AN ACTION FOR MALICIOUS PROSECUTION BUT THAT RIGHT HAS NOT BEEN VIOLATED BY THE SIXTH CIRCUIT IN THIS CASE; MOREOVER, THE COURT NEITHER DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS NOR DID IT DEPART FROM ANY OF ITS OWN PREVIOUS DECISIONS OR THOSE OF OTHER CIRCUITS

Petitioner cites *Smoot* v. *Fox*, 353 F.2d 830 (6th Cir., 1965) for the point that "[a]n action for malicious prose-

cution falls well within the recognized forms of action at common law." *Id.* at 833. This case is only relevant insofar as it holds there is a right to a jury trial in a malicious prosecution case. However, the holding of the Sixth Circuit is in no way in conflict with this. As pointed out in Argument I, above, when a court grants a directed verdict or a judgment notwithstanding the verdict it does not violate one's right to a jury trial. This decision is not in the least in conflict with *Smoot* v. *Fox*, supra, or with cases in any other circuit. In fact, the Sixth Circuit, as recently as 1968, has vacated a verdict for the plaintiff in a malicious prosecution suit and remanded for entry of judgment for the defendant based on the defense of advice of counsel. *Taylor* v. *Shepherd*, 391 F.2d 263 (6th Cir., 1968). In *Taylor* v. *Shepherd* the Sixth Circuit properly reversed the jury verdict for the plaintiff because they found, as here,

> "* * * that there is no evidence from which the jury in the instant case could properly have found failure on the part of appellant fully and fairly to disclose the material facts to his attorney * * * Appellant's motion for a directed verdict should have been granted."

Id. at 264.

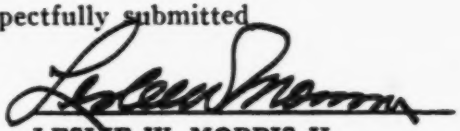
In any event, advice of counsel was not the only defense relied upon. The Sixth Circuit correctly held that there was a lack of sufficient proof on all of the elements necessary to sustain Petitioner's cause of action.

CONCLUSION

The decision of the Court of Appeals, Sixth Circuit, is clear and correct. The Petitioner failed to set forth any reason for this Court to exercise its discretion to grant a review on writ of certiorari. This case does not involve constitutional questions or federal law but turned upon the application of Kentucky law to the facts of the case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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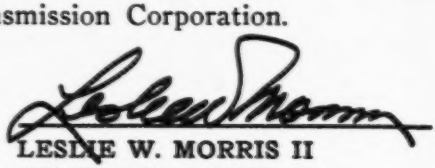
CERTIFICATE OF SERVICE

It is hereby certified that on the 28 day of May, 1974, three copies (each) of this printed brief were served upon Hon. David C. Graves, Jr., 256 South Limestone, Lexington, Kentucky 40508, Hon. Jean L. Auxier, First National Bank Building, Pikeville, Kentucky, and Hon. Leer Buckley, 502 Security Trust Building, Lexington, Kentucky 40507, attorneys for Emmett C. Worley, Petitioner; and upon Hon. H. Raymond Andrews and Hon. Thomas E. Morgan. P. O. Box 1273, Charleston, West Virginia 25325, and Hon. Joseph L. Arnold, First National Bank Building, Lexington, Kentucky 40507, attorneys for the other two Respondents, Columbia Gas of Kentucky, Inc. and Columbia Gas Transmission Corporation.



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MAY 30
MICHAEL RODA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1640

EMMETT C. WORLEY,

Petitioner,

v.

COLUMBIA GAS OF KENTUCKY, INC., KENTUCKY GAS TRANSMISSION CORP., MUTUAL PIPELINE CONTRACTORS, INC., JOHN T. DIX and CHESTER NOWICKE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF COLUMBIA GAS OF KENTUCKY, INC., AND KENTUCKY GAS TRANSMISSION CORPORATION, TWO OF THE RESPONDENTS

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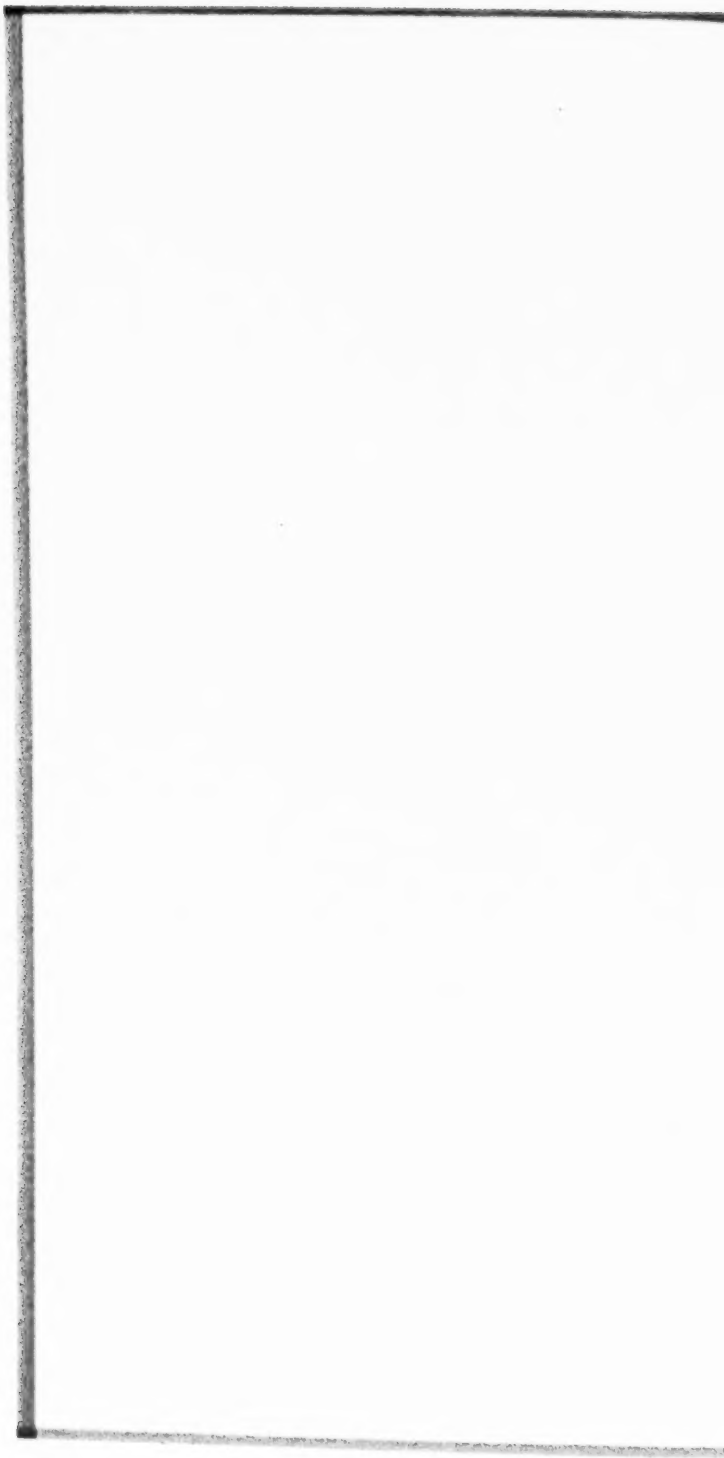

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Columbia Gas of Kentucky, Inc., and Kentucky Gas Transmission Corporation, two of the Respondents herein, respectfully pray that this Court deny Petitioner's petition for a writ of certiorari.

OPINION BELOW

The opinion of the Court of Appeals is reported at 491 F.2d 256 and is appended to Petitioner's petition at pages 1a through 23a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1973. A timely petition for rehearing *en banc* was denied on February 1, 1974. Petitioner in his petition asserts the invoking of this Court's jurisdiction under 28 U.S.C. 1254(1). Petitioner's petition for a writ of certiorari was docketed by the Clerk of this Court on May 1, 1974.

QUESTIONS PRESENTED

Petitioner failed to present to this Court a statement of the questions presented for review as required by Rule 23(1)(c) of this Court's Rules adopted June 15, 1970, effective July 1, 1970.

These Respondents respectfully submit that the questions attempted to be presented to this Court appear to be:

1. Was Petitioner deprived of a Constitutional right to trial by jury by the action of the Court of Appeals?
2. Is the opinion of the Court of Appeals based upon such an incomplete record that a substantial Federal question is presented?
3. Is the opinion of the Court of Appeals in conflict with its own and other prior opinions?

CONSTITUTIONAL PROVISIONS

This case involves no Constitutional provision, treaty, statute, ordinance or regulation; Petitioner's petition asserts (pp. 8-10), however, that the Seventh Amendment to the Constitution of the United States is involved. That Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[1]

STATEMENT OF THE CASE

Petitioner instituted his civil action against all Respondents before the United States District Court for the Eastern District of Kentucky. The jurisdiction of the District Court was invoked because of diversity of citizenship, Petitioner at the time of the institution of his action being a citizen of Texas, while Respondents were citizens of Kentucky or Delaware.

The fundamental issue presented to the District Court and on appeal to the Court of Appeals was whether the evidence could support a finding that one or more of these Respondents conspired with other Respondents to maliciously prosecute Petitioner to his damage. The District Court held: "Yes"; but, on appeal, the Court of Appeals held: "No."

All facts pertinent to this issue are accurately and completely stated by Circuit Judge Weick in the opinion of the Court of Appeals (Appendix to the

---

[1] Petitioner's Table of Authorities (p. iii) quotes the Eighth Amendment, but without later explanation or argument.

petition at 3a-8a; 491 F.2d at 258-260). These Respondents adopt Judge Weick's statement of the case as their own and will not repeat it herein.

Counsel for these Respondents will not impose upon this Court's time to point out the multitude of inaccuracies, irrelevancies and incomplete statements contained in Petitioner's statement of the case, since they are self-evident, particularly when read in light of the opinion of the Court of Appeals. One thing is certain: where the petition conflicts with the appellate opinion, the petition misstates the facts.

ARGUMENT

Petitioner fails to set forth and support any ground whatever which would call for this Court to exercise its discretion to grant a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals. Rule 19; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1954). Counsel for these Respondents will hereinafter refute each of the three "reasons" presented by Petitioner, dealing first (I A and I B, below) with Petitioner's numbers I and III, which represent an unsuccessful effort to show "an important question of federal law" under Rule 19(1)(b). Thus, Petitioner's "reason" numbered II is dealt with last.

I.

THERE IS NO "IMPORTANT QUESTION OF FEDERAL LAW"

A. Petitioner was not deprived of trial by jury in contravention of the Seventh Amendment to the Constitution of the United States.

Petitioner asserts erroneously that the Court of Appeals by its opinion precluded Petitioner from enjoying his Constitutional right to trial by jury, relying on the Seventh Amendment to the Constitution of the United States.

This Court has previously considered this very argument in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, *reh. denied* 386 U.S. 1027 (1967), in which the appellant asserted that the overturning by the Tenth Circuit Court of Appeals of a jury verdict was, *inter alia*, a violation of the plaintiff's right to a trial by jury guaranteed by the Seventh Amendment. This Court affirmed the Court of Appeals, on the following premises:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n. o. v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n. o. v. See Baltimore & Carolina Line, Inc. v. Redman, supra. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n. o. v. on appeal. Section 2106 of Title 28 provides that, 'The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order

of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.'" (386 U.S. at 322.)

Petitioner cites, in support of his theory, the case of *Lynn v. Smith*, 281 F.2d 501 (3rd Cir. 1960). This case dealt with a dispute between plaintiff and the Village of Pittsfield, Pennsylvania, concerning the ownership of a small tract of land used as a park, upon or near which the Village placed a bench. The plaintiff removed and destroyed the bench, claiming it was on his land, and was arrested for destruction of public property. He later brought a civil action for malicious prosecution, which the trial court dismissed on the ground the Village had acted on advice of counsel. The Court of Appeals for the Third Circuit reversed, holding only that the questions of counsel's advice and the good faith of the Village were evidentiary issues to be presented to a jury under Pennsylvania law.

But neither *Lynn v. Smith*, nor any other malicious prosecution case, abolishes the judicial duty to require jury verdicts to rest on evidence, in Pennsylvania or anywhere else.[2] *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163 (E.D.Pa. 1971). Thus *Lynn v. Smith* in no

[2] In the instant case, pursuant to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Court of Appeals properly considered the controlling Kentucky law. It is worth noting that prior to Erie, when a Federal common law was developing, this Court in Brown v. Selfridge, 224 U.S. 189 (1912), held in a malicious prosecution case that where there was a failure to adduce proof of the facts necessary to establish lack of probable cause, there was no error in taking the case from the jury. This decision is entirely consistent with the law of Kentucky, with which the Court of Appeals was concerned in its review of this case on appeal.

way establishes a criterion to be urged as a basis for this Court to exercise its discretion and grant a writ of certiorari.

B. The Decision of the Court of Appeals is not in conflict with its own previous decisions.[3]

Petitioner cites and quotes from the case of *Smoot v. Fox*, 353 F.2d 830 (6th Cir. 1965), *cert. denied* 384 U.S. 909, *reh. denied* 384 U.S. 958 (1966), as the sole support for his contention that the Court of Appeals in the instant case is in conflict with its own prior decisions. The facts of the *Smoot* case do not bear out Petitioner's theory. The case involved a petition for a writ of prohibition against the Judge of the United States District Court for the Western District of Michigan. Plaintiff instituted a libel suit against the League of Women Voters, but later found it prudent to obtain an order of dismissal with prejudice at his costs. The defendants moved the trial court to hold a hearing to establish their costs, indicating that they were prepared to present at the hearing their entire defense to the dismissed action. The trial court accepted this approach, and the plaintiff sought and was granted a writ of prohibition against such unprecedented hearings on costs. As the Court of Appeals noted,

> "In essence, defendants would convert a proceeding to assess costs into an action for damages for malicious prosecution of a civil action, and have the Court, instead of a jury, award the damages." (353 F.2d at 832.)

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[3]While the petition formally asserts in "reason" III a conflict with other circuits, Petitioner limits his argument to a discussion of a single Sixth Circuit opinion (Petition at 12).

In this context, Chief Judge Weick commented that malicious prosecution cases, like other forms of action at common law, are to be determined by jury trials (353 F.2d at 833); but this truism is hardly germane to the issue now at bar.

Petitioner's is not the first Kentucky case charging malicious prosecution to come before the Court of Appeals. In *Taylor v. Shepherd*, 391 F.2d 263 (6th Cir. 1968), the Court of Appeals considered the defendant's appeal of a case from the same trial court which tried the instant case. As here, the District Court left to the jury the decision on the effect of advice of counsel. As here, the Court of Appeals held that, under Kentucky law, advice of counsel was a complete defense to a claim of malicious prosecution, vacated the judgment, and remanded the case with directions to enter judgment for the defendant.

Thus if consistency is the issue, the Petition must be denied.

C. Petitioner failed to raise any federal question insofar as the decision of the Court of Appeals relates to these particular respondents.

Insofar as these Respondents are concerned, the Court of Appeals upheld their innocence on grounds entirely independent and apart from those questioned by Petitioner.

As to Respondent Columbia Gas of Kentucky, Inc., the Court of Appeals concluded that "there is not even a scintilla of evidence" to sustain a judgment against it, and held, "The District Court erred in denying its motion for a directed verdict." (Appendix to the Petition, 8a; 491 F.2d at 260.) In his petition, Petitioner does not question that holding.

As to Respondent Kentucky Gas Transmission Corporation, the Court of Appeals held that there was "*no* proof that" its employee "had actual or apparent authority * * * to prosecute" Petitioner, and "*no* evidence that any affidavits for the arrest * * * were induced by or resulted from" its employee. (Appendix to the Petition, 8a, 9a; 491 F.2d at 260, 261. Emphasis supplied.) Petitioner does not mention these conclusions of the Court of Appeals; and clearly, agency is a question of state law, does not present a Federal question, and should not be reviewed by this Court. *Otis v. Oregon Steamship Co.*, 116 U.S. 548 (1886).

As these matters were not raised by Petitioner, the decision of the Court of Appeals cannot be disturbed. Rule 23(1)(c); and see *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 324-325 (1972):

> "The * * * issue discussed in the dissent was not set forth as a 'question presented for review' in the petition for certiorari, and therefore our Rule 23(1)(c) precludes our consideration of it."

II.

THE ASSERTION OF AN INCOMPLETE RECORD IS TOTALLY WITHOUT FOUNDATION, AND OTHERWISE NOT SUITABLE FOR CONSIDERATION IN A PETITION FOR WRIT OF CERTIORARI

The effect of Petitioner's "reason" numbered II is to assert (Appendix to the Petition at 27a) that five transcript pages are missing (out of 2245 pages), which *may* have caused the Court of Appeals to reach an erroneous decision. While this argument is without the slightest substance, a brief response is appropriate.

The facts concerning a supposed deficient record are misstated in the petition and in the appended letters.

In the first place, of the five numbered pages claimed to be missing (*i.e.*, 1027, 1307, 1388, 1547 and 1548), the three-volume appendix filed by these Respondents with the Sixth Circuit Clerk's office contains pages numbered 1027 and 1388.

As to the remaining three pages (*i.e.*, 1307, 1547, and 1548), a reading of the official transcript reveals that only a misnumbering occurred, and that no pages are in fact missing.[4]

Furthermore, Petitioner's "reason" numbered II comes too late even if the facts supported it. Petitioner should have, and clearly would have, raised this aspect of the case before the Court of Appeals if the point had any basis in fact. It cannot be raised at this late date. *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971).

Moreover, the point as raised by Petitioner in his "reason" numbered II does not meet any of the standards of Rule 19.

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[4] Appended hereto is an affidavit from the Official Court Reporter establishing that no pages are in fact missing but that an inadvertent misnumbering occurred.

CONCLUSION

Counsel for Respondents, Columbia Gas of Kentucky, Inc., and Kentucky Gas Transmission Corporation, respectfully submit that the decision of the Sixth Circuit Court of Appeals in this case is clearly correct, and that Petitioner has failed to raise any ground for this Court to exercise its discretion to grant a review of the opinion below on writ of certiorari. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 30, 1974

APPENDIX

A F F I D A V I T

COMMONWEALTH OF KENTUCKY,
COUNTY OF FAYETTE, TO WIT:

I, Ella G. McGarvey, Official Reporter, United States District Court, Eastern and Western Districts, do hereby certify that the transcript of all the evidence introduced and heard, or offered to be introduced and rejected, and all objections concerning the same, as well as a description of all papers or documents offered to be used as evidence in Civil Action No. 2186, Emmett C. Worley v. Columbia Gas of Kentucky, Inc., Kentucky Gas Transmission Corporation, Mutual Pipeline Contractors, Inc., John T. Dix and Chester Nowicke, when tried in the United States District Court for the Eastern District of Kentucky, at Lexington, January 25 through February 14, 1972, before His Honor, Mac Swinford, Judge of Said Court, was prepared by me or under my supervision; that through inadvertence certain pages were misnumbered; that page 1306 is succeeded directly by page 1308, there being no page numbered 1307; and that page 1546 is succeeded directly by page 1549, there being no pages numbered 1547 and 1548.

IN WITNESS WHEREOF, witness my official hand as reporter aforesaid, this the 21st day of May, 1974.

Ella G. McGarvey
Official Reporter

Subscribed and sworn to by Ella G. McGarvey, Official Reporter, United States District Court, Eastern and Western Districts, this 21 day of May, 1974, before me a Notary Public in and for Fayette County, Kentucky.

My commission expires May 14, 1977.

Mary Alice Green
Notary Public, ~~Fayette~~ State of ~~County~~, Kentucky

(Notarial Seal)